Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

Tod N. Rockefeller
Petitioner,
v.
Westinghouse, Waste Isolation Division, a division of CBS Corp.; CBS Corporation; Viacom, Inc., Successor by Merger to CBS Corp. dba Westinghouse, Waste Isolation Division,
Respondents.

On Appeal to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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END

Questions Presented

1. Whether this Court will require that lower courts follow well-established legal doctrines and case law ?

2. Whether this Court will require that remedial action be taken towards money damages suffered by the United States ?

Parties Proceeding

Petitioner was plaintiff (05-5091 LRS) in the Eastern District Washington district court [E.D. Wash.], and subsequently Appellant to the U.S. CoA for the Ninth Circuit (06-35290].
Respondent is CBS Corporation. Respondent's contact is through their lead counsel: Brad Fagg, Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Ave., NW, Washington D.C. 20004 (202) 739-3000.

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CASES

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Seattle Audubon Soc. v. Robinson, 931 F.2d 590, 595 (9th Cir. 1991);
United States v. Andrus, 775 F.2d 825, 834-40 (7th Cir. 1985);
U.S. ex. rel. Joseph v. Cannon, et al., 642 F.2d 1373, 1385 (D.C. Cir. 1981);
U.S. ex. rel. Kelly v. The Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993);
U.S. ex. rel. Newsham v Lockheed, Inc., 722 F.Sup. 607, 612 (N.D. Cal. 1989);.
U.S. ex. rel. Trice v. Westinghouse Hanford Co., No. CS-96-0171 (E.D. Wash. Mar. 1, 2000);
Vermont Agency Nat. Res. v. U.S., 529 U.S. 765, 773 (2000).

Rules

Supreme Court ("Sup.Ct.") Rules 10(a), 10(c), 14.1

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The Ninth Cir. denied Petitioner's Petition for Rehearing En Banc (06-35290) with an Order filed on OCT 30, 2006.

Constitutional Provisions at Issue

First Amendment Right of Free Speech
Fifth Amendment Right of Due Process of Law
Seventh Amendment Right of Trial by Jury

Statement of the Case

This case involves the False Claims Act (FCA) claims of Petitioner, stemming from his service as an Environmental Scientist with the U.S. Dept. of Energy ("DOE") at the Waste Isolation Pilot Plant ("WIPP") in southern New Mexico. While at the WIPP, the goal of Petitioner was to accomplish the mission of the project in a cost effective manner. Petitioner was indeed the "original source" for all of the FCA allegations that he had made. See 31 U.S.C. § 3730(e)(4).

A previous case through the lower courts had been prosecuted by Petitioner culminating in a Petition with this Court, No. 03-1703. As a result of Petition 1703 and additional evidence obtained by Petitioner, it became evidently clear that the Respondent to said Petition, Washington TRU Solutions, LLC ("WTS"), was NOT the proper party defendant to the case. WTS had engaged in a conspiracy of fraud to aid CBS Corp. in escaping from FCA liability. CBS had never made an appearance in the case to deny any of Petitioner's FCA allegations towards CBS. What is detailed *supra* was the basis for filing the second district court Complaint (05-5091 LRS).

Argument

Question 1.

There are three essential points of law that were thoroughly supported by Petitioner that both lower courts failed to address that WTS and CBS spuriously claimed to obtain the dismissal of this instant Complaint (05-5091). WTS/CBS made NO factual showings to support ANY of their claims.

The first issue involves the claimed application of the doctrine of *res judicata/collateral estoppel.* In case No. 00-1352, within the District of Columbia, the proper party defendant was CBS Corp.. See App.5 at A-13 through A-16. CBS never

made an appearance within 00-1352, so that case obviously cannot act as *res judicata* concerning the current Complaint (05-5091). Both of the lower courts applied said doctrine in error.

Similarly, the FCA six (6) year statute of limtation cannot apply to the current Complaint due to both te fraud of WTS/CBS and the Continuing Wrong doctrine. See *Irwin*, 498 U.S. at 95; *Seattle Audubon*, 931 F.2d at 595. WTS/CBS have engaged in a very lengthy campaign of fraud upon all of the courts involved for more than five (5) years. Throughout App.5 twenty-two (22) instances of the fraud upon the courts of WTS/CBS are specifically outlined. Despite very substantial demonstrated grounds for the application of the Continuing Wrong doctrine, the 9th Cir. refused to apply said doctrine in error.

The third and very significant error of both lower courts was the refusal to apply the doctrine of "binding precedent". See 9th Cir.R.36-3(a); see also App.5 at A-21, A-22. The *Trice* case correctly, and with great detail, interpreted the 9th Cir.'s *Kelly* case, to rule that a pro se FCA relator has Article III standing to sue on behalf of the United States. Both lower courts refused to recognize that the *Trice* case was the "law of the case" or "binding precedent." See *Id.* As a result, the district court had violated its own local rule 7.1(g)(2)(b). The 9th Cir. violated its own rule 36-3(a) by not recognizing and abiding by the ruling in *Trice* that a FCA relator may prosecute their own case pro se. See *Id.*

Question 2.

To meet the requirements of Fed.R.Civ.P.9(b) for specifying allegations of fraud, the DC Cir. has provided the following requirement:

> "the circumstances constituting fraud . . . [must be] stated with particularity" by including "the time, place and content

> of the false misrepresentations, . . . and what was obtained or given up as a consequence of the fraud."

See *U.S. ex. rel. Joseph*, 642 F.2d at 1385. Petitioner had very specifically related the alleged fraud with names, dates, explanations of the fraud, exact dollar values, and more. The FCA liability linked to specific documented evidence [doc 2's Encl. IX at 3-8; Encl. X at 044- 062] was detailed which added up to $7,287,000.. Respondents never made ANY kind of a factual showing to deny any of the demonstrated FCA liability *supra*.

The United States has indeed suffered money damages from the fraudulent claims of CBS Corporation. Remedial action must be taken as the FCA requires. For a sample of the campaign of fraud upon all of the courts involved by WTS and CBS, see App.5 at A-13 through A-20.

Prayer for Relief

Petitioner prays that this Court grant this instant Petition to resolve the conflicts, described above, concerning enforcement of the FCA when it has clearly been demonstrated to have been violated.

Respectfully submitted,

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOD N. ROCKEFELLER, United States ex rel., Plaintiff-Appellant	No. 06-35290
v.	D.C. No. CV-05-05091-LRS E.D. of Wash., Spokane
WESTINGHOUSE WASTE ISOLATION DIVISION, a division of CBS Corp.; et al., Defendants-Appellees.	Filed On: OCT 30 2005

ORDER

Before: SCHROEDER, Chief Circuit Judge, REINHARDT and HAWKINS Circuit Judges.

The panel has voted to deny the petition for panel rehearing. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote whether to rehear the matter en banc. See Fed.R.App.P.35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings shall be accepted in this closed case.

CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOD N. ROCKEFELLER, United States ex rel., Plaintiff-Appellant	No. 06-35290
v.	D.C. No. CV-05-05091-LRS
WESTINGHOUSE WASTE ISOLATION DIVISION, a division of CBS Corp.; et al., Defendants-Appellees.	Filed and entered 08/11/06

JUDGMENT

Appeal from the United States District Court for the Eastern District of Washington (Spokane).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

APPENDIX 3

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOD N. ROCKEFELLER, United States ex rel., Plaintiff-Appellant	No. 06-35290
v.	D.C. No. CV-05-05091-LRS
WESTINGHOUSE WASTE ISOLATION DIVISION, a division of CBS Corp.; et al., Defendants-Appellees.	Filed and entered 08/11/06

MEMORANDUM *

Appeal from the United States District Court for the Eastern District of Washington
Lonny R. Suko, District Judge, Presiding
Submitted August 7, 2006 **

Before: SCHROEDER, Chief Circuit Judge, REINHARDT and HAWKINS Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 8th Cir.R.36-3.
** This panel unanimously finds this case suitable for decision without oral argument.
See Fed.R.App.P.34(a)(2).

A review of the record and the opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument. See *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982)(per curiam)(stating standard).

Accordingly, we summarily affirm the district court's judgment.

The motions for costs and sanctions are denied.

All other pending motions are denied as moot.

AFFIRMED.

APPENDIX 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA
ex. Rel. TOD N. ROCKEFELLER,
Plaintiff,
v.

No.
CV-05-5091-LRS

VIACOM, INC., Successor by Merger to CBS Corp., d/b/a WESTINGHOUSE, WASTE ISOLATION DIVISION, and the new CBS Corp.,
Defendants.

ORDER OF DISMISSAL

Plaintiff was employed as an environmental scientist for the United States Department of Energy at its Waste Isolation Pilot Plant in Carlsbad , New Mexico, from 1993 until his termination in 1997. Acting as his own lawyer, he has filed multiple lawsuits against both the United States Department of Energy as well as its related entities during the intervening years. See Statement of Points and Authorities in Support of Defendants' Motion to Dismiss, Ct. Rec. 10.

In this present case, Plaintiff asserts four causes of action. Counts I and II assert violations of the False Claims Act codified at 31 U.S.C. § 3729(a)(1) and (2). Counts III and IV assert common law theories of recovery based upon "Payment by Mistake" and "Unjust Enrichment." Plaintiff's claims were the subject of previous litigation in the case of *United States, ex. rel. Rockefeller v. Westinghouse Elec. Co.*, 274 F.Supp. 2d 10 (D.D.C. 2003) and were dismissed more than

2 years ago. While Plaintiff has deleted an individual defendant named in the prior lawsuit from the current litigation, the real parties in interest remain the same as do the essential allegations of the lawsuit which Plaintiff has filed herein.

In the earlier action, Judge Walton of the United States District Court for the District of Columbia ruled that Plaintiff was a non-lawyer and therefore could not bring claims on behalf of the United States without being represented by qualified legal counsel. Having had the full and fair opportunity to litigate the question of proceeding pro se, the earlier court's ruling binds the parties to this action and may not be re-litigated in the Eastern District of Washington. Additionally, this Court finds the reasoning of the earlier decision to be in accord with the law and concludes that private persons acting without legal counsel lack standing to recover claims against a defendant on behalf of the United States whether proceeding under the False Claims Act or on a theory of common law recovery.

The False Claims Act has a six (6) year statute of limitations. 31 U.S.C. § 3731(b)(1). Even if Plaintiff had standing to bring this lawsuit, the matters complained of are barred by the passage of time.

Accordingly, for the reasons set forth in the earlier decision as well as the Defendants' Statement of Points and Authorities in Support of Defendants' Motion to Dismiss (Ct. Rec. 10), Plaintiff's complaint and this pending lawsuit are DISMISSED with prejudice.

IT IS SO ORDERED. The District Court Executive shall provide a copy of this order to each of the parties, enter judgment in accordance with this order, and CLOSE THE FILE.

DATED this 9th day of March, 2006.

s/Lonny R. Suko

LONNY R. SUKO
United States District Judge

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOD N. ROCKEFELLER, United States ex rel., Plaintiff - Appellant,

vs.

WESTINGHOUSE WASTE ISOLATION DIVISION, a division of CBS Corp.; CBS CORPORATION; VIACOM, INC., Successor by Merger to CBS Corp. d/b/a Westinghouse, Waste Isolation Division, Defendants - Appellees.

No. 06-35290

Petition for Rehearing by the Panel and Petition for Rehearing En Banc

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This captioned Appeal was dismissed by this Court with a Memorandum filed on 8/11/06, as follows:

> "A review of the record and the opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument."

This Court's 8/11/06 Panel Decision (henceforth "8/11 PD") conflicts with seven (7) decisions of the Supreme Court, and seven (7) decisions of this Court, along with several points of fact that have been overlooked. These points are very clearly demonstrated within Appellant's Reply Brief, attached as Enclosure 1 (henceforth "Encl. 1"). Appellant is filing a combined pleading as captioned above.

Appellees made three claims to dismiss this case: 1) it is barred by *res judicata*; or 2) a *pro se* False Claims Act ("FCA") relator lacks standing to prosecute; or 3) the FCA statute of limitations bars the action. Each of these claims was thoroughly dispelled by Appellant within Encl. 1 with documented facts and very relevant case law. These issues presented by Appellant were the furthest possible from being "insubstantial" as can be.

Appellees had made no factual showings to rebut the claims put forth by Appellant.

Respectfully submitted,

s/Tod N. Rockefeller

Tod N. Rockefeller, *pro se*

Dated and served: August 17th, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOD N. ROCKEFELLER,
United States ex rel.,

Enclosure 1

Plaintiff - Appellant,

No. 06-35290

vs.

WESTINGHOUSE WASTE ISOLATION DIVISION, a division of CBS Corp.; CBS CORPORATION; VIACOM, INC., Successor by Merger to CBS Corp. d/b/a Westinghouse, Waste Isolation Division,
Defendants - Appellees.

APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON
CIVIL NUMBER 05- 5091-LRS

REPLY BRIEF OF PLAINTIFF - APPELLANT

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B. STATUTES

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Appellant served his Informal Brief on 5/20/06 (henceforth "Inf-Br. ") Appellees served a Brief for Appellees Washington TRU Solutions, LLC ("WTS"); Viacom, Inc.; and CBS Corporation on 7/5/06 (henceforth "Br-App.").

ARGUMENT

Within the E.D. Wash. District Court proceedings, only Washington TRU Solutions, LLC ("WTS") initially made an appearance. The actual named defendants [CBS Corp. and Viacom, Inc.] only made an appearance on 1/13/06 (doc nos. 14, 15) after they had been served with a Notice of Default on 1/10/06 by Appellant. Since both CBS and Viacom make no separate distinct claims (doc nos. 14, 15), and simply just agree with the claims of WTS, Appellant will refer, for the sake of simplicity, to the claims within the Br-App. as those of WTS.

A. FRAUD UPON THIS COURT

WTS has undauntedly continued on with its campaign of fraud upon this Court. Appellant totaled up an astounding number of twenty-two (22) instances of alleged knowingly false representations made by WTS within the Br-App.. One of the most prominent purposes of WTS's fraud upon this Court, is to convince this Court that this instant case impacts and concerns the current operation of a crucial and imperative government project. Said project is the U.S. Department of Energy's ("DOE's") Waste Isolation Pilot Plant ("WIPP"). This claim of Appellees is simply not true as will be clearly demonstrated below. See Appellant's Reply to Appellees' Opposition to Appellant's Motion for Sanctions at 2 through 4; Appellant's Motion for Sanctions at 1,2; Appellant's Response to Appellees' Motion for Summary Affirmance at 2, 3, 8, 9; Appellant's Informal Brief at 6, 7.

It is apparently the hope of Appellees that this Court will be misled to believe that the False Claims Act ("FCA") claims of Appellant will substantially interfere with an important DOE project at the WIPP. Appellees further wish this Court, once convinced or misled by their claim *supra*, to take a 'blind eye' to facts and supporting case law presented by Appellant as the district court had done in error. For a valid judgment, the Supreme Court has ruled that: "Fraud cannot be substituted for facts." See *Johannessen v. U.S.*, 225 U.S. 227, 241 (1912).

1. The Proper Party Defendant

Within all four of Appellant's pleadings to this Court noted *supra*, Appellant had made the point that WTS has not made any factual showings that WTS is the proper party defendant to this

captioned Complaint rather than CBS / Viacom. This fact is reflected, once again, within the Br-App., which is detailed below:

i. "Pursuant to various novation and asset transfer agreements,Viacom, Inc. provided the Amended Complaint and tendered the defense to WTS." Br-App. at 4

Stating that there are "various . . . agreements" does not provide this Court with any useful information at all, and is certainly unconvincing.

ii. "Because the Amended Complaint, again, involved the same allegations from the 1990s regarding DOE payments and the WIPP facility, it appeared that Mr. Rockefeller was, again, attempting to sue the party with financial responsibility for any claims regarding such payments. That party, for these purposes, is WTS." Br-App. at 4

Does WTS provide any factual information on how it is responsible for fraudulent claims made by and paid to CBS prior to WTS's buy-out ?

iii. "WTS filed a motion to dismiss the Amended Complaint . . . . In that motion, WTS explained that it was the successor in interest for these purposes to the DOE WIPP contractor, that is the real party in interest and proper defendant, ..." Br-App. at 4, 5

WTS tries to make it sound like there was a detailed factual explanation to the district court on how it is the "proper defendant". There was no explanation provided to the district court, only unsupported statements such as those found *supra* and *infra*.

iv. "WTS advised the district court that it was the only real party in interest and proper defendant, ..." Br-App. at 6

"WTS advised the district court" with no useful factual information. *Id*

v. "He contends that appellees committed fraud concerning the identity of the proper defendant, which supposedly somehow should save his claims from res judicata and the statute of limitations. That argument is factually incorrect and illogical." Br-App. at 11, 12

WTS is wrong, the argument of Appellant is supported by facts. *Cf.* WTS's standard buy-out agreement for the WIPP's Maintenance and Operating ("M&O") contract states the following:

> "Under the terms of the agreement, . . . BNFL . . . will maintain its portion of the liabilities the businesses incurred prior to the date of today's buyout."

See Appellant's 2nd Supplemental Excerpts of Record (henceforth"2nd S.E.R.") Item No. 2 at 0007. WTS, as a Limited Liability Company ("LLC"), does not have CBS's liabilities for making fraudulent claims in FY95 and FY98 transferred to it as a result of WTS's FY99 buy-out. See *Id* at 0005.

vi. "WTS is the successor to the contractor that received payments from the government, the real party in interest, and the proper party defendant." Br-App at 14, FN 5

WTS, again, is wrong. See section A.1.v. *supra.*

vii. "WTS is the successor-in-interest for these purposes to . . . the time period relevant to Mr. Rockefeller's claims. Through various novation and asset transfer agreements,

> CBS and its affiliates have no responsibility for and claims related to the WIPP facility . . . ." Br-App. at 22

WTS, again, is wrong. See section A.1.v. *supra.*

viii. "Contrary to Mr. Rockefeller's mistaken conjecture, the timing of WTS's assumption of liability has no bearing on whether it is the proper defendant for purposes of this lawsuit." Br-App. at 22

WTS, again, is wrong. See section A.1.v. *supra.*

WTS relates no useful factual information within the eight (8) claims Appellant quotes *supra.* This is "for purposes of this lawsuit" to commit fraud upon this Court to conceal the fact that only CBS and Viacom are the proper party defendants to this captioned Complaint. WTS has engaged in a conspiracy of fraud to assist CBS / Viacom in escaping from FCA liability.

2. Appellant's Due Process Claim

WTS has made a knowingly false representation concerning the claim of Appellant that his District of Columbia ("DC") action, case no.00-1352, was dismissed in a manner that was inconsistent with due process of law. WTS states that:

> "In sum, he complains that the federal court in the District of Columbia "exceeded its authority by 'disregarding' the requirements of 'valid statutes'" when it dismissed his complaint there. Amended Compl. at ¶¶ 7, 9. He adds that he was unable to obtain a fair trial because the DC court denied his motion for recusal. Id at ¶ 8. This argument merits little attention." Br-App. at 20

WTS is attempting to mislead this Court. Appellant's true and actual due process claim,

concerning the DC court, consisted of the following:

> "The prior case 00-1352 had been dismissed "in a manner inconsistent with due process of law", and is therefore void. See *In Re: Four Seasons Securities Law Litigation v. State of Ohio*, 502 F.2d 834, 842 (10th Cir. 1974). The DC district court had denied a timely and unopposed motion for a meager amount of additional time to respond to WTS's Motion to Dismiss. Plaintiff had obtained electronic copies of nearly two hundred (200) cases related to the FCA, and he needed additional time to review so many cases, such as the 9th Cir. *Kelly* listed *infra*. **Plaintiff was never given a real chance to defend his complaint from dismissal."**

See doc 22 at 9, 10; see also doc 2's Enclosure I at A-24, A-25. WTS has attempted to steer this Court away from Appellant's true Due Process claim quoted *supra*, with a completely different one. This is no mistake. WTS, again, has committed fraud upon this Court.

In addition, WTS makes another knowingly false representation by claiming that:

> "He contends that the first action in D.C. was dismissed without due process, but that is an issue that was rejected by the appeals court there." Br-App. at 11

WTS is wrong again. The only issue that the DC Cir. ruled upon in their 1/24/04 Order, was the "holding that *qui tam* relators may not proceed *pro se*." See doc 2's Encl. I at A-3. The DC Cir. never "rejected" the due process claim. The E.D. Wash. District Court never addressed this due process claim of Appellant in error.

3. WTS's Citation of the *Trice* Case

WTS has misrepresented the ruling in *Trice*,

and claimed that it had been improperly cited. Br-App. at 17, n.7. Appellant had addressed this as follows:

> "WTS claims that the U.S. ex rel. Trice v. Westinghouse Hanford Co., No. 96-CS-171-WFN, 2000 WL 34024248 (E.D. Wash. Mar. 1, 2000) court "based its reasoning on the theory that the claims had been assigned in their entirety" and the Supreme Court had based FCA "relator standing . . . based on only a "partial" assignment of such claims." doc 10 at 13. Plaintiff had explained that the "*Trice* court very specifically, and with great detail, based its reasoning on the theory that the claims had been Partially assigned NOT "assigned in their entirety as WTS claims."

See doc 22 at 11; see also 2nd S.E.R. Item 1 at 3, 4. WTS also claims that Appellant "improperly" relied "on an unpublished decision, see 9th Cir. R. 36-3; E.D. Wash. L.R. 7;.1(g)(2), . . ." Br-App. at 17, n.7. Both rules cited by WTS *supra* allow "Unpublished dispositions" to be cited "when relevant under the doctrine of law of the case, . . ." 9th Cir.R. 36-3(b)(i). This issue will be further discussed in Sec. C *infra*.

4. WTS's Citation of 28 U.S.C. § 2415

WTS attempts to mislead this Court into believing that:

> "Actions for fraud are subject to a three-year statute of limitations. See 28 U.S.C. § 2415(a), (b)."

See Br-App. at 18, n.8. WTS's attempt to convince this Court that said statute applies to this instant Complaint is wrong. Section (a) requires that:

> ". . . , every action for money damages founded upon any contract . . . , shall

> be barred unless the complaint is filed within six years after the right of action accrues . . ."

Section (b) deals with an "action for money damages . . . which is founded upon a tort . . ." and has a statute of limitation of three years. While some torts may involve some kind of fraud, this instant FCA Complaint involves contract fraud. Only the six-year statute of limitations of § 2415(a) can apply to this case, while Sec. (b) is inapposite.

In an abundance of caution, Appellant has demonstrated within Enclosure I [Affidavit] that even a three-year statute of limitations does not eliminate this case. The DC action [00-1352] was filed prior to three years from when Appellant gathered and reported evidence of fraudulent claims made by CBS Corporation. See Enclosure I.

Only half of the twenty-two (22) alleged instances of fraud upon this Court have been demonstrated *supra* that clearly exemplifies WTS's wrongdoing. The 10th Cir. has ruled that it is:

> "essential that there be a showing of conscious wrongdoing what can properly be characterized as a deliberate scheme to defraud before relief from a final judgment is appropriate."

See *U.S. v. Buck*, No. 01-7015, Sec. A.2. (10th Cir. Mar. 8, 2002). Relief from the E.D. Wash. Court's "final judgment is appropriate." See *Id* The Supreme Court has ruled that: "untruthfulness" means that "credibility has been wholly discredited" and that "no other conclusion is possible." See *Mesarosh v. U.S.*, 352 U.S. 1, 9 (1956).

B. FACIAL VS FACTUAL ATTACK

Appellant had made an error in stating that the "Facial Attack of Appellees" was a "new issue". Inf-Br. at10. There has been so much for Appellant to cover concerning this case that at times it seems

somewhat overwhelming. This issue was thoroughly brought to the attention of the DC Cir., and was part of Appellant's E.D. Wash. Complaint as doc 2's Encl. IV. See 2nd S.E.R. Item 1 at 4 through 7. The facial attack of WTS upon the specific and factual allegations of WTS's fraud was also raised within the DC district court [00-1352's doc 47 at 2]. WTS's facial attack upon Appellant's factual allegations is not supposed to be able to succeed. See *U.S. ex rel. Barrett v. Johnson Controls, Inc., et al.*, 2003 U.S. Dist. LEXIS 5973, 01-CV-1641-M at Sec. II.B. (N.D. Tex. April 9, 2003); See also *U.S. ex rel. Coppock v. Northrop Grumman Corp.*, 2002 U.S. Dist. LEXIS 14510, 2002 WL 1796979, at 5 (N.D. Tex. August 1, 2002); *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

C. STANDING OF A *PRO SE* FALSE CLAIMS ACT ("FCA") RELATOR

1. The *Trice* Case is "Binding Precedent" [9th Cir. R. 36-3(a)]

As WTS has claimed, Appellant did not "improperly rely on an unpublished decision [*Trice*]." Br-App. at 17, n.7. The E.D. Wash. LR 7.1(g)(2)(b) requires that:

> "(2) Unpublished decisions may not be cited, except that . . . (b) unpublished Eastern District of Washington decisions may be cited when relevant under the doctrines of law of the case, "

Black's 7th Edition at 893-94 provides the following definitions:

> "Law of the case. 2. An earlier decision giving rise to the application of this doctrine. Cf. LAW OF THE TRIAL; . . . ."
> "Law of the trial. A legal theory or court ruling that is not objected to and is used

or relied on in a trial <neither party objected to the court's jury instruction, so it became the law of the trial>. Cf. LAW OF THE CASE."

Henceforth, if defendant Westinghouse Hanford Co. did not object to the ruling in *Trice* [that a FCA relator may proceed *pro se*] by appealing that decision to this Court, said ruling becomes the Law of the Trial, and also the Law of the Case. This was found to be true. E.g.: Appellant did a search on the PACER system, and found no appeal docketed with the parties of Westinghouse Hanford Co. and Charles D. Trice with this Court. The 9th Cir. R. 36-3(a) requires that:

"(a) Not Precedent. Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, . . ."

Similarly, the ruling in the *Trice* case noted *supra*, that a FCA relator can proceed *pro se*, should have been considered "binding precedent" by the E.D. Wash. District Court. See *Id* Said court ruled in error when it did not consider *Trice* relevant.

2. The *Kelly* Case Thoroughly Outlines FCA Relator Standing

In *U.S. ex rel. Kelly v. The Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), this Court had addressed the issue of FCA relator standing. In no uncertain terms, *Kelly* ruled that a FCA relator is assigned the claims when the government declines to intervene. Also, this Court ruled in *Kelly* that a FCA relator has Article III standing to sue. *Id* at 748. *Kelly* went further by stating that:

"In addition, federal courts consistently recognize that an assignee of a fraud claim can assert his claim despite being unable to satisfy traditional standing

requirements. *Amerifirst Bank*, 757 F. Supp. at 1370; *Main Hurdman*, 655 F. Supp. at 267. See also *National Ass'n of Realtors, v. Nat. Real Est. Ass'n*, 894 F.2d 937, 941 (7th Cir. 1990)."

"We are unconcerned . . . that the qui tam plaintiff is only assigned part of the government's claim, and that the government retains the right to intervene. Assignments can be made conditional on the occurrence of a future event. Allan E. Farnsworth, Contracts § 11.3 at 789 (2nd ed. 1990). In addition, the fact that the relator is only entitled to a maximum of thirty percent of the total recovery of a qui tam suit is insignificant."

See *Id.* The interpretation of *Kelly* within the *Trice* case is very well presented and correct, concluding that a FCA relator may proceed *pro se*. See Excerpt of Record at 004 through 006.

3. The Supreme Court's Ruling within *Vermont Agency*

Besides the agreement with *Kelly* that FCA relators have Article III standing, the Supreme Court also addressed "representational standing" and "private" prosecution of "*qui tam* actions." See *Vermont Agency of Nat. Res. v. U.S.*, 529 U.S. 765, 773-75 (2000). *Vermont* ruled that:

"We believe, . . . in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." Id at 773

"Although we have never expressly recognized "representational standing" on the part of assignees, we have routinely

entertained their suits . . ." Id at 773

> "We are confirmed in this conclusion by the long standing tradition of *qui tam* actions in England and the American Colonies." Id at 774
>
> Qui tam actions appear to have originated around the end of the 13th century, when private individuals who suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf." Id at 775

Vermont also gives reference to a number of "informer statutes" in the early United States where private individuals prosecuted their own cases, and shared in the "bounty." See *Id* at 776-77, n.5 thru 8. The Supreme Court further ruled on the "private prosecutor" within *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 127-28 (1998) as follows:

> "In past centuries in England, in the American colonies, and in the United States, private persons regularly prosecuted criminal cases. The interest in punishing the defendant and deterring violations of law by the defendant and others was sufficient to support the "standing" of the private prosecutor . ."

These rulings of the Supreme Court *supra*, concerning the very long history of the private prosecution of informer statutes, leaves no doubt that FCA relators have the standing to proceed *pro se*.

D. *RES JUDICATA* / COLLATERAL ESTOPPEL

1. The Proper Party Defendant

Appellant has satisfied his burden of very clearly demonstrating, with factual evidence, that

WTS, as a Limited Liability Company ("LLC"), is NOT the proper party defendant to this instant Complaint. See 2nd S.E.R. Item 2 at 0005, 0007: see also Sec. A.1. *supra*. This Court has ruled that:

> "The doctrine of limited liability is a basic and fundamental rule of corporate law, . . . See e.g.: *Anderson v. Abbott*, 321 U.S. 349, 362 (1944)("Limited liability is the rule not the exception, ...")."

See *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*, No.03-35480 (9th Cir. Feb. 11, 2005). Typically, an LLC does not have liabilities, which arose from operations of a company prior to the date of its buy-out, transferred to [it] the new company making such buy-out. This well-established and "fundamental rule of corporate law" [see *Id*] is reflected within WTS's own standard LLC buy-out agreement noted *supra*. See 2nd S.E.R. Item 2 at 0007. WTS has failed to deny the very specific allegation of fraud concerning the identity of the proper party defendant with the "particularity" necessary to satisfy the requirement of Fed.R.Civ.P 9(c). Consequently, WTS has admitted that it is NOT the proper party defendant to this instant Complaint.

2. Application of *Res Judicata* by the District Court

In accepting WTS's fraudulent claim that it is the proper party defendant to the Complaint [05-5091], the E.D. Wash. District Court's judgment was erroneous. This is reflected in said court's claim concerning the previous DC action [00-1352] that: ". . . the real parties in interest are the same . . . ." doc 24 at 2. This statement is wrong. The real defendant to the DC action (CBS Corp.) never made an appearance. This Court has ruled that:

> "a judgment entered in a previous action . . . did not have any *res judicata* effect because there had not been any adjudi-

cation between the parties on any cause of action."

See *Steen v. John Hancock*, No. 95-15874, Sec. II. (9th Cir. Feb. 10, 1997). Because Appellant never had "any adjudication" with CBS, there can be no "*res judicata* effect." See *Id*

E. FCA STATUTE OF LIMITATIONS

1. The Prior DC Judgment is Inconsistent with Due Process

As Appellant has claimed, the DC action [00-1352] was dismissed in a manner inconsistent with due process of law. See doc 2's Encl. I at1, 2, A-24, A-25; doc 22 at 9, 10; and Informal Br. at 8, 11. Appellant had detailed how and why this claim should be considered:

> "The [DC] district court noted that Appellant has "become aware of case law", but that "he has failed to cite any authority or articulate any legal theory" with "respect" to his "claims." doc 43 at 1, 2. The denial of Appellant's timely motion (doc 41) with a claim that he had not supported his request for additional time to respond [to the Motion to Dismiss] with "any authority" or any "legal theory", is without a doubt a very bogus claim, and a clear violation of this Court's *Fox* precedent . . . ."
>
> "The *Fox* precedent of this Court does NOT specify that a *pro se* party must specify legal authorities or theories to obtain additional time to respond to a motion to dismiss (emphasis added). This is a very clear error of law of the district court which is inconsistent with the due process of law. The Supreme

> Court has ruled that a court is supposed to be forbidden to violate a party's due process rights. See *Davis v. Passman*, 442 U.S. 228, 234 (1979)."

See doc 2's Encl. I at A-25. Appellant had only been requesting a:

> "meager amount of additional time [17 days] to respond to WTS's Motion to Dismiss. Plaintiff had obtained electronic copies of nearly two-hundred (200) cases related to the FCA, and he needed additional time to review so many cases, such as the 9th Cir. *Kelly* case listed *infra*. Plaintiff was never given a real chance to defend his complaint from dismissal."

See doc 22 at 10. Also that:

> **"The prior case 00-1352 had been dismissed "in a manner inconsistent with due process of law", and is therefore void.** See *In Re: Four Seasons Securities Laws Litigation v. State of Ohio*, 502 F.2d 834, 842 (10th Cir. 1974)."

See *Id* at 9, 10 Appellant was not provided with a "full and fair opportunity for litigation" of his claims by the DC district court. See *Kourtis v. Cameron*, 419 F.3d 989, 994 (9th Cir. 2005).

Appellant had specifically detailed *supra* that he had a legitimate claim to render the prior case [001352] void, to suspend the application of the FCA six-year statute of limitations. Rather than to respond to the facts outlined by Appellant, WTS has responded with the fraud quoted within Sec. A.2. *supra*. Said fraud of WTS attempts to mislead this Court into believing that Appellant's Due Process claim is something completely different from what it actually is. WTS then claims that: "This argument [of Appellant] merits little attention." Br-App. at 20 Consequently, WTS has not responded, whatsoever, to the Due Process

claim of Appellant *supra*, and has admitted-by-silence that said claim suspends the operation of the FCA statute of limitations. This Court has ruled on the doctrine of admission-by-silence as so:

> "The general rule concerning admissions by silence or acquiescence is well established. When an accusatory statement is made in the defendant's presence and hearing, and he understands and has an opportunity to deny it, the statement and his failure to deny are admissible against him." (quoting *United States v. Moore*, 522 F.2d 1068, 1075 (9th Cir.1975).

See *United States v. Giese*, 597 F.2d 1170, 1196 (9th Cir. 1979); see also *United States v. Schaff*, 948 F.2d 501, 505 (9th Cir. 1991).

2. This Court's "Continuing Wrong Doctrine"

What Appellant has outlined *supra*, and within all of his other pleadings to this Court, is that WTS has been conducting a lengthy and identical campaign of fraud upon four courts extending over four years. Appellant is not aware of exactly what this Court considers to be adequate to justify the application of its "Continuing Wrong Doctrine", but this instant Appeal must meet the minimum. See *Nesovic v. USA*, No. 94-55128 (9th Cir. Dec.8, 1995) (holding that "repeated instances or continuing acts of the same nature . . ." warrants the application of equitable tolling through the 9th Circuit's "Continuing Wrong Doctrine".); See also *Seattle Audubon Society v. Robinson*, 931 F.2d 590, 595 (9th Cir. 1991) (holding that "equitable tolling [is] proper where defendant fraudulently conceals facts . . . to avoid liability."); *Costello v. U.S.*, 365 U.S. 265, 271 n.3 (1961) (holding that fraud is the "traditional equity ground for cancellation of a judgment."); *Johanness v. U.S.*, 255 U.S. 227, 238-

39 (1912) (holding that fraud is a "very ancient" ground for reversal of a judgment).

In addition, the Supreme Court has also ruled that:

> "Time limits in lawsuits between private litigants are customarily subject to "equitable tolling," *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989)."

See *Irwin v. Veterans Admin.*, 498 U.S. 89, 95 (1990). For the foregoing reasons, Appellant prays that this Court apply equitable tolling towards the FCA six-year statute of limitations.

F. ADDITIONAL SPURIOUS CLAIMS OF WTS

1. "While the [DC] case was pending, CBS Corporation sold its interests in the WIPP contractor, whose name was then changed to "Washington TRU Solutions LLC" ("WTS")."

See Br-App. at 2, 3. Appellant had responded to this falsity as below:

> "This statement is a knowingly false representation, ... The DC complaint (00-1352) was served upon CBS on August 26, 2002 as noted *supra*. See Encl. V at 3 CBS "sold [nearly four years prior] its interest in the WIPP contractor" not "while the case was pending." (emphasis added). See *Id.*" doc 22 at 2, 3

WTS's buy-out of CBS occured during FY99 NOT during 2002 when the DC case was pending. WTS's attempts to mislead this Court are many.

2. "Mr. Rockefeller complains that he was the victim of employment discrimination by DOE. Br. at 4 That is a matter that . . . was not presented to the District Court in these proceedings." Br-App. at 6, n.2

This is another knowingly false representation in WTS's attempt to eliminate the clear demonstration of pretext for Appellant's removal from his job. See the Amended Complaint at 4, ¶ 7 which states:

> "Plaintiff had filed several complaints within the USDC-DC concerning solely employment discrimination tort claims . . ."
>
> 3. "The United States did not appear in this case. Although the Amended Complaint evidently was not served on the United States, ..."

Br-App. at 7; see also doc 10 at 5. WTS continually makes this claim without checking the Proof of Service [Docket Entry # 3] that Appellant filed. Said Proof of Service is in electronic form within the District Court's docket, and it is instantly available for WTS to check. WTS did not conduct such a verification because this is another instance of fraud intended to mislead this Court.

See 2nd S.E.R. Item 3 for Appellant's service of the Amended Complaint, with all Enclosures, to the local U.S. Attorney Mr. James A. McDevitt on 11/29/05.

CONCLUSION

For the above cited reasons, Appellant prays that this Court reverse the district court's grant of summary judgement, and remand the case back to Trial Court as a Matter of Law. See Anderson, 477 U.S. at 252.

Respectfully submitted,
s/Tod N. Rockefeller

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Dated and served: August 1st, 2006